UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

P.S.K. SUPERMARKETS, INC.
Employer[1]

and Case No. 29-RC-10302

LOCAL 338, RETAIL, WHOLESALE
AND DEPARTMENT STORE UNION/
UNITED FOOD AND COMMERCIAL
WORKERS, AFL-CIO, CLC
Petitioner[2]

DECISION AND DIRECTION OF ELECTION

P.S.K. Supermarkets, Inc. (the Employer) is engaged in the operation of retail supermarkets at various locations in the State of New York. As described in more detail below, the Employer operates eight stores where the store employees are represented by Local 338, Retail, Wholesale and Department Store Union/United Food and Commercial Workers, AFL-CIO, CLC (the Petitioner) in a multi-store bargaining unit. On November 15, 2004, the Petitioner filed a petition under Section 9(c) of the National Labor Relations Act, seeking to represent store employees at a new store located at 1420 Fulton Street, in the Bedford-Stuyvesant neighborhood of Brooklyn ("the Bed-Stuy store"), in a single-site bargaining unit, separate from the pre-existing multi-store unit. However, the Employer contends that employees at the Bed-Stuy store constitute an accretion to the pre-existing

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1 The Employer's name appears as amended at the hearing.

2 The Petitioner's name appears as amended at the hearing.

multi-store unit, that the contract covering the multi-store unit bars an election at this time, and that the petition must therefore be dismissed.

A hearing was held before Emily DeSa, a Hearing Officer of the National Labor Relations Board. In support of its contentions, the Employer called its vice president, Daniel Katz, to testify. The Petitioner called two witnesses to testify: business agent Jack Caffey and assistant director of organizing Guy James.

As discussed in more detail below, I find that the petitioned-for unit limited to the Bed-Stuy store is appropriate for bargaining. I reject the Employer's contention that the Bed-Stuy store is an accretion to the multi-store unit, and that the multi-store contract constitutes a bar. I will therefore direct an election below in the petitioned-for, single-site unit.

Background information including bargaining history

PSK Supermarkets are owned by Sidney Katz (president) and his sons, Daniel Katz and Noah Katz (vice presidents). At the time of the hearing, there were 13 stores in New York State, including seven stores in New York City, one in Nassau County, three in Dutchess County, and one in Putnam County. The headquarters are located in Mt. Vernon, New York.

There is no dispute that the Petitioner has represented employees employed by the Employer for more than 30 years, in a multi-location bargaining unit. The parties stipulated that bargaining-unit classifications include department managers and assistant managers (who are called "Tier A" employees), and cashiers, stock clerks, bookkeepers and department clerks (who are called "Tier B" employees). In addition to the Katz

family members listed above, the Employer's management includes a vice president of operations (Andy Faitak), and a store manager for each store.

Although the parties' collective bargaining history before 2002 was not described in detail, it appears that the Employer was party to a multi-employer contract with the Petitioner called the "industry contract" or the "chain-store agreement." The Petitioner's assistant director of organizing, Guy James, testified that in 2002 the Petitioner agreed to negotiate with a new employer association called the Independent Supermarket Operators of Greater New York, Inc. ("ISOGNY"), in order to provide economic relief to smaller, non-chain stores who had trouble affording the industry contract. The result of those negotiations was the so-called ISOGNY contract, effective from August 21, 2002, to June 30, 2006 (Employer Exhibit 1).[3] According to James, PSK Supermarkets was one of the ISOGNY members who sought this lower-cost agreement, and Daniel Katz himself was one of the negotiators for ISOGNY.

The contract states that it should apply to "all covered retail supermarkets" that are ISOGNY members. Article I, section A(1) states:

> ISOGNY shall limit its membership to stores that typically are less than 20,000 square feet and whose weekly sales are less than $175,000. ISOGNY members are small independent or family run stores that are not publicly owned or part of regional or national chains.

Article II, Section D provides:

> A "covered store" is any store that is located within the boroughs of New York City and the counties of Westchester, Nassau and Suffolk in the State of New York, for which the Union has established majority status, within a store, within the group of job classifications described in Appendix B, pursuant to a valid card check…. In the case of a grand opening or a new store, the Union agrees to allow a ninety (90) day period from the date of opening for the Employers to finalize staffing and job designation decisions.

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[3] References to the record will hereinafter be abbreviated as follows: "Er. Ex. #" refers to Employer Exhibit numbers, and "Tr. #" refers to transcript page numbers.

When the contract was signed in 2002, the Employer had ten stores in New York City and Nassau County covered by the ISOGNY agreement. (The stores in Dutchess and Putnam counties are not covered.) In 2003, one Queens store closed, and then another Queens store was sold. Thus, by the end of 2003, the Employer's stores covered by the ISOGNY agreement included the following eight stores:

283 E. 204th Street, Bronx

885 Gerard Ave., Bronx

135-46 Lefferts Blvd., Ozone Park (Queens)

202-15 Hillside Ave., Hollis (Queens)

41-25 Greenpoint Ave., Sunnyside (Queens)

9105 3rd Ave., Bay Ridge (Brooklyn)

382 McDonald Ave., Brooklyn

1368 Peninsula Blvd., Hewlett (Nassau County)

Despite the contract's limitation of ISOGNY members to stores that "typically" measure less than 20,00 square feet and have less than $175,000 in weekly sales, Daniel Katz testified that seven of the Employer's eight covered stores have more than 20,000 square feet (if storage space is included), and that four of the eight have weekly sales exceeding $175,000.[4]

The Employer bought the Bed-Stuy store (which used to be a Pathmark store) in January 2004. It was closed for a few months during construction, and then re-opened for business on October 13, 2004. Katz stated that the Bed-Stuy store has more than 20,000 square feet in "selling" space, and more than 30,000 square feet total, if storage

[4] Er. Ex. 2 shows the following average weekly sales: $197,220 for the McDonald Avenue store, $242,497 for the Hollis store, $255,144 for the Hewlett store, and $368,991 for the Bay Ridge store.

space is included. However, the record does not clearly indicate the Bed-Stuy store's weekly sales figures. Petitioner witness Caffey gave hearsay evidence, to the effect that employees said the store was selling between $400,000 and $500,000 per week. Katz neither confirmed not denied this estimate; the Employer conceded only that the Bed-Stuy store's sales exceed $175,000 per week (Employer's brief, fn.13).

As another point of comparison, Caffey testified that the other PSK stores covered by the ISOGNY contract range from 30 to 60 employees,[5] whereas the Bed-Stuy store has at least 125 employees.[6] Thus, it is obvious that the Bed-Stuy store is substantially larger than the other eight stores in question.

The issue and the parties' positions

The issue in this case is whether the Bed-Stuy store is an accretion to the unit that includes the other eight stores covered by the ISOGNY contract. The Employer claims it is, and has already applied the ISOGNY contract to employees at that store. The Employer argues that although the ISOGNY contract "typically" applies to smaller stores, there is no hard-and-fast size maximum set forth in the contract. If all nine stores are included in the bargaining unit, as the Employer claims they must be, the unit would contain approximately 490 employees.

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5 This estimate is consistent with the Employer's seniority list (Er. Ex. 13), which shows approximately 27 employees at Store #1, 33 employees at Store #2, 47 employees at Store #4, 30 employees at Store #5, 54 employees at Store #7, 36 employees at Store #8, 50 employees at Store #9 and 58 employees at Store #14. (The specific locations of these numbered stores were not disclosed, but Katz testified that they were stores in the existing bargaining unit.)

6 Katz initially estimated that the Bed-Stuy store has 150 employees, then said as a "conservative" estimate that "it's definitely more than 125" (Tr. 74-75). A list of Bed-Stuy employees printed in approximately early November 2004 (Er. Ex. 3) shows 173 employees. Caffey testified that he collected 155 authorization cards around that same time (first week in November). An undated, company-wide seniority list (Er. Ex. 13) shows 146 employees at Bed-Stuy (store #19). The Petitioner stated its belief that the Bed-Stuy store may have as many as 225 employees, but the record does not indicate the basis for this belief. For purposes of this Decision, it will be assumed that the Bed-Stuy store has at least 125 to 150 employees.

By contrast, the Petitioner claims that the Bed-Stuy store far exceeds the small stores that the ISOGNY contract was intended to cover. The Petitioner wants to negotiate for these 125 to 150 employees, in a unit separate from the 340 to 365 employee unit previously covered by ISOGNY at the eight stores.

The parties do not dispute that the Petitioner has majority support of the Bed-Stuy employees, and that the Employer recognizes the Petitioner as their collective bargaining representative. The parties' real concern appears to be contractual -- that is, whether the Employer is "allowed" to apply the low-cost ISOGNY contract to those employees over the Petitioner's objection, or whether the Petitioner will be free to try to negotiate better terms for them in a separate unit (assuming that the Petitioner would win an election).

Operation of the Bed-Stuy store and other stores

The following description of the Employer's operations is based on Daniel Katz' unrebutted testimony, unless otherwise indicated.

Similarity of job classifications at various stores

As noted above, classifications in the existing bargaining unit include cashiers, stock clerks, bookkeepers, department clerks, department managers and assistant managers. (The store manager for the Bed-Stuy store, Tony Rosado, is not in the unit.) The parties stipulated that employees in those classifications at the Bed-Stuy store perform the same functions as employees in those same classifications at the other stores.

Staffing the new store, including transfers

Daniel Katz testified that the company decided to staff the Bed-Stuy store with a

combination of new hires and transfers from its other stores. Before the store opened for business on October 13,[7] the Employer started hiring new employees -- who were intended for the Bed Stuy store -- but placed them initially in other stores to be trained. Of the 173 Bed-Stuy employees employed as of early November (Er. Ex. 3), approximately 27 new employees were hired in July, 47 were hired in August, 31 were hired in September, and 19 were hired in early October. After an initial training period at other stores, the new employees were transferred to Bed-Stuy in approximately late September (two weeks before the store opened) to help stock the shelves and otherwise prepare for the store opening.[8]

In addition, approximately 30 employees who already worked in other stores were transferred to the Bed Stuy store in late September. Er. Ex. 11 indicates that at least 10 employees were transferred from the other Brooklyn stores (5 from Bay Ridge and 5 from McDonald Avenue), and at least 2 or 3 employees were transferred from each store in the Bronx, Queens and Nassau County. Katz testified that some transfers were permanent, and some were temporary. For example, an experienced meat wrapper from one of the Bronx stores went to Bed-Stuy for three weeks to help get the store "running," then returned to her Bronx store. Similarly, Katz testified that a half-dozen cashiers came to Bed-Stuy for a few weeks, to fill out a certain shift that was understaffed, but then went back to their own stores as soon as the Bed-Stuy store hired enough cashiers for that shift.

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7 All dates hereinafter are in 2004 unless otherwise indicated.

8 An assertion in the Employer's post-hearing brief, that the Bed-Stuy store was staffed entirely with "unit members" from the other eight stores, is somewhat misleading. Most employees at Bed-Stuy were hired in the late summer or early fall to work at Bed-Stuy, but were sent to other stores solely for training purposes until the Bed-Stuy store was ready. That is hardly the same as staffing a new store with all previously-employed unit employees.

Other transfers among stores

Katz testified somewhat vaguely that transfers have occurred to and from the Bed-Stuy store for other reasons as well. He initially stated that a half-dozen employees transferred since the store opened in October, for such reasons as filling vacancies, promotions and covering for employees on vacation. However, he did not give any examples of actual transfers. On cross-examination, Katz reiterated that there were "a number" of transfers to and from Bed-Stuy because the Employer "may have" overhired or someone "may have" called in sick, but he could only "guess" at the number. No specific examples were given.

Multi-site seniority

Katz also testified that seniority is determined on a "company-wide" basis. The Employer submitted a seniority list (Er. Ex. 13), which includes the Bed-Stuy employees as well as employees from the other eight stores covered by the ISOGNY contract.[9] Katz did not explain what the seniority list is used for, but the ISOGNY contract generally provides that seniority shall govern layoffs and recalls; that for assignments, promotions and transfers, seniority shall be the deciding factor when all other factors (fitness and ability) are equal; and that when an employee transfers to another store, his/her classification seniority shall be "dovetailed" at the new store (Er. Ex. 1, Articles VIII and IX.).

Geographic distance between stores

As noted above, the Employer's stores covered by the ISOGNY contract are located in Brooklyn, Queens, the Bronx and Nassau County. Katz estimated that the

9 The seniority list is not truly "company-wide" since it does not include the employees in Dutchess and Putnam counties. It would be more accurate to describe it as "unit wide" since it covers the nine stores which the Employer seeks to include in the multi-store bargaining unit.

closest store to Bed-Stuy (the McDonald Avenue store in Brooklyn) is 2 or 3 miles away, and that the other stores range from 5 miles away (Bay Ridge) up to 10 miles away (the Bronx stores).

Local versus centralized management

Store managers, such as Tony Rosado, report to vice president of operations, Andy Faitak. Katz testified that Faitak visits each store at least once every two weeks, and that he has frequent telephone contact with the store managers.

Store managers devise the weekly schedule for employees, within a personnel budget for each store determined by Faitak. Store managers also handle the day-to-day aspects of running the store, such as checking the store's stock levels, cleanliness, signage, pricing and customer service. Katz testified that store managers are allowed to send employees home if they engage in misconduct, but that only Katz and Faitak have authority ultimately to decide whether to impose discipline, including warnings, suspensions or terminations. As an example, Katz testified that when two cashiers came up "short" in November, their store manager contacted Faitak, who decided not to suspend them.

Store managers may hire Tier B employees on their own,[10] but Faitak hires Tier A employees. Only Faitak has authority to lay off, recall, transfer and promote employees. Katz also testified that Faitak attends grievance meetings, and generally deals with labor relations issues at the unionized stores. The Employer submitted a

[10] Katz initially testified that Faitak and store managers hire Tier B employees "together." In response to questions from the Hearing Officer and the Petitioner, however, Katz later admitted that it would not be "practical" for Faitak to interview all applicants at all the stores, and that new Tier B employees may be hired by the store manager before Faitak meets them. Nevertheless, Katz added that Faitak meets each new hire during their probationary period, for further evaluation. The record contains no evidence to show whether Faitak has reversed the store managers' hiring decisions.

series of documents (Er. Exs. 5 through 11) to show that Faitak notifies the Petitioner of various employee transfers and terminations.

Business agent Caffey, who represents employees at the Employer's store in Ozone Park, Queens, has not had much contact with Bed-Stuy store manager Rosado. Nevertheless, Caffey testified generally that he meets with store managers to discuss grievances and "small disciplines." Under the ISOGNY contract, the union must file written grievances with the store manager "or other such person designated by the company" (Er. Ex. 1, Article XX). The record does not indicate who is responsible for job assignments, overtime decisions or evaluating employees.

Administrative functions, such as payroll and accounting, are handled in the Employer's main office in Mt. Vernon, New York. The Employer also keeps all personnel records there.

Terms and conditions of employment

Faitak, along with Noah Katz and Daniel Katz, decided to apply the ISOGNY contract to the Bed-Stuy store, including the union security and dues deduction provisions. As a result, employees at the Bed-Stuy store receive the same terms and conditions of employment as employees at the other stores covered by the ISOGNY contract.

Integration of operations and other information

All of the Employer's stores sell the same merchandise, which is purchased and received via a centralized warehouse. Merchandise may be moved from one store to another, for example, if one store is running out of a sale item. Katz claimed that this happens on a daily basis.

The Employer also moves equipment from store to store, particularly when it does store renovations once or twice per year. Katz stated that some extra shelves were transferred from the McDonald Avenue store to the Bed-Stuy store, and various types of hand trucks and a meat-department scale were transferred from another store to Bed-Stuy. At some point in the future, the Employer plans to move a meat case, some checkout registers and some compressors from Bed-Stuy to other stores.[11]

DISCUSSION

The Board has defined an accretion as "the addition of a relatively small group of employees to an existing unit where these additional employees share a community of interest with the unit employees and have no separate identity." Safety Carrier, Inc., 306 NLRB 960 (1992). In assessing a claim of accretion, the Board weighs such factors as interchange of employees, common supervision and working conditions, functional integration of operations, centralization of management and administrative control, similarity of duties and skills, and bargaining history. The Board follows a particularly restrictive policy in accreting employees to an existing bargaining unit, since it precludes those employees from exercising their right to free choice regarding union representation. Towne Ford Sales, 270 NLRB 311 (1984), *enfd.* 759 F.2d 1477 (9th Cir. 1985). Thus, accretion is not warranted unless the additional employees in question

[11] It should be noted that the witnesses also described the parties' dealings with each other regarding the Bed-Stuy store. Briefly, the testimony included Katz' description of a conversation he had with Petitioner's president John Durso regarding the Bed-Stuy store in March; whether the Petitioner was given proper notice of the store's opening in October; whether the Employer followed the proper procedure in giving dues-deduction authorization cards to new employees when they were hired for the Bed-Stuy store; whether the Employer initially refused to recognize the Petitioner as representative at the Bed-Stuy store; whether the Employer's transfer of existing employees to the Bed-Stuy store was allowed under the ISOGNY contract (over which the Petitioner has filed grievances); and whether the Employer gave the Petitioner proper access to the Bed-Stuy store in early November when it tried to collect its own membership cards. This information will not be described in detail here, since it has minimal relevance to the accretion issue.

have an “overwhelming” community of interest with the existing unit, such that they have “little or no separate group identity," and could not constitute a separate appropriate bargaining unit. Safeway Stores, Inc., 256 NLRB 918 (1981); Local 144, Hotel, Hospital, Nursing Home & Allied Services Union v. NLRB, 9 F.3d 218, 223, 144 LRRM 2617, 2620 (2nd Cir. 1993). In practical effect, a party seeking to prove accretion faces a heavy burden. Bay Shipbuilding Corp., 263 NLRB 1133, 1140 (1982), *enfd*. 721 F.2d 187 (7th Cir. 1983); J.E. Higgins Lumber Co., 332 NLRB 1172, 1172-3 (2000)(Member Higgins, concurring). Where employees *are* found to be an accretion to an existing unit, a current contract covering that unit may bar a petition. Firestone Synthetic Fibers Co., 171 NLRB 1121 (1968).

In the context of multi-location employers, a single-site bargaining unit is presumed to be appropriate, unless the presumption is rebutted by contrary evidence. *See, e.g.*, Haag Drug Co., 169 NLRB 877 (1968)(single-store unit in retail chain is presumptively appropriate). This presumption has been extended to situations where an employer transfers a portion of its employees at one location to a new location. Gitano Group, Inc., 308 NLRB 1172 (1992). Specifically, the Board presumes that the unit at the new facility is a *separate* appropriate unit from any unit that existed at the old facility. If the presumption has not been rebutted, the Board applies a majority test to determine whether the employer must recognize the union as representative of the separate unit at the new facility. Id., 308 NLRB at 1175. Furthermore, even when the union has majority status in the new location, the collective bargaining agreement covering employees in the original location does not necessarily apply to the separate unit in the new location, unless the parties explicitly agree to apply it. United Steel

Workers of America, Local 7912 (U.S. Tsubaki, Inc.), 338 NLRB 29 (2002). Obviously, if the contract from the old location does *not* apply to a separate unit in the new location, it could not bar an election in the new unit.

Thus, in a multi-location context, a party seeking to include employees at a new location into an existing bargaining unit at another location (or locations) faces a double or "parallel" burden, that is, to prove the accretion and to overcome the presumptive appropriateness of a single-site unit. *See, e.g.*, Passavant Retirement and Health Center, Inc., 313 NLRB 1216 (1994)(resident coordinators at new facility are not an accretion to existing bargaining unit in employer's main building 300 yards away, and presumptive appropriateness of a separate unit at new facility not rebutted, because of separate day-to-day supervision, lack of employee interchange and other factors). The Board has identified the degree of interchange and separate supervision as two particularly important factors in determining whether an accretion is warranted. Passavant and Towne Ford Sales, *supra*.

In the instant case, I find that the Employer has not met its burden of proving that employees at the Bed-Stuy store are an accretion to the existing multi-store bargaining unit represented by the Petitioner. Rather, I find that the petitioned-for, single-site unit at the Bed-Stuy store is appropriate for purposes of collective bargaining. I will therefore direct an election below in that separate unit.

First and foremost, the record does not demonstrate regular contact and interchange among employees at the various stores. Although 30 employees from other stores were transferred to Bed-Stuy in September, as part of the initial staffing of the store (which reached a complement of 173 employees by November), the Board

generally gives less weight to transfers related to opening new facilities. Rental Uniform Service, Inc., 330 NLRB 334, 336 (1999). *See also* Renzetti's Market, Inc., 238 NLRB 174, 175 at fn. 8 (1978). Presumably, this is because openings are "one-time" events, not expected to provide a continuing basis for interchange between separate facilities. Katz' vague testimony regarding other, subsequent transfers -- e.g., that there were "a number" of transfers because someone "may have" called in sick -- is insufficient to demonstrate ongoing or regular interchange between facilities. Furthermore, although the Employer submitted a seniority list covering the nine stores in question, there was no evidence to show that use of the list has actually caused transfers, "bumping" or any other interchanges between the stores.

As for common supervision, Katz testified that vice president Faitak is solely responsible for disciplining, terminating, laying off, recalling, transferring and promoting employees, as well as hiring Tier A employees. However, Faitak may visit each store as little as once every two weeks. It is obvious that no one person could be entirely responsible for the day-to-day supervision of almost 500 employees in nine different stores in four counties. The record indicates, rather, that the local managers are responsible for much of the day-to-day supervision at their stores, such as scheduling employees, assigning their tasks, interviewing and hiring employees (at least Tier B employees), and perhaps handling low-level discipline and grievances. The Board has noted that, in retail chain-store operations, store managers typically control the day-to-day supervision (e.g., hiring, scheduling and assigning employees, and serving as the first step in the grievance procedure), even though other elements of the managerial control (e.g., establishing personnel and labor relations policy) may be quite centralized.

Melbet Jewelry Co., 180 NLRB 107 (1969). In finding a single-site unit appropriate, the Board has noted:

> [W]hat is most relevant is whether or not the employees at the sought store perform their day-to-day work under the immediate supervision of one who is involved in rating their performance and in affecting their job status and who is personally involved with the daily matters which make up their grievances and routine problems. It is in this framework that we examine community of interest, for the day-to-day problems and concerns among the employees at one location may not necessarily be shared by employees who are separately supervised at another location.

Renzetti's Market, *supra*, 238 NLRB at 175. I conclude that the presence of a separate manager at the Bed-Stuy store, who is responsible for many day-to-day concerns of employees there, reinforces that unit's separate identity and the appropriateness of the single-site unit.

Furthermore, the geographic distance between the Employer's various stores, including a 10-mile distance between the Bed-Stuy and Bronx stores, weighs against an accretion here. Super Valu Stores, Inc., 283 NLRB 134, 136 (1987)(10 to 12 mile distance weighs against accretion, especially without common day-to-day supervision or interchange between two warehouses).

The bargaining history between the parties is somewhat inconclusive, since there are factors weighing both for and against accretion. On one hand, the parties have historically bargained in a multi-store unit, and their contract seems to contemplate the addition of new stores within New York City and certain nearby counties (Er. Ex. 1, Art. II, Sec. D). On the other hand, it is not clear that the ISOGNY contract language applies here, since the Bed-Stuy store is substantially larger than the small independent stores eligible for ISOGNY membership, i.e., "typically" less than 20,000 square feet and less than $175,000 in sales (Er. Ex. 1, Art. I, Sec. A(1)). The parties have no

history of including such a large store (at least 125 to 150 employees) in the unit where other stores employ only 30 to 60 unit employees. Finally, it must be noted that the Petitioner does not seek to represent the Bed-Stuy employees as part of the larger unit, and does not want to apply the ISOGNY contract to that store.[12] Overall, I find that the unprecedented size of the Bed-Stuy store militates against any claim that the parties' bargaining history mandates an accretion.

Finally, the fact that employees at the Bed-Stuy store have the same working conditions as employees in the other eight stores -- caused by the Employer's unilateral application of the ISOGNY contract -- carries little weight in this case. At best, it would be tautological to say that the Employer should be allowed to treat the Bed-Stuy store as an accretion because it has already chosen to treat it as an accretion. At worst, the Employer's unilateral action could be seen as a conscious attempt to "create" an accretion in order to avoid bargaining with the Petitioner in a separate unit, and therefore cannot be given weight in assessing whether there was a "normal" accretion. *See* Safeway Stores, *supra*, 256 NLRB at 919 (Board gives little weight to factors "consciously manipulated" by employer to create an accretion, in effort to avoid higher rates of another union).

Finally, the Employer points to many other factors, such as the identical job classifications and functions from store to store, and the integration of merchandise and equipment from store to store. These factors, admittedly, would support a finding that the nine-store unit sought by the Employer may also be *an* appropriate unit. However,

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12 It is interesting to note that, in an unfair labor practice context, an existing contract will apply to employees relocated to a new location only if the union has majority status *and if the parties mutually agree to apply the contract there.* United Steelworkers of America, Local 7912 (U.S. Tsubaki, Inc.), 338 NLRB 29 (2002).

the Employer's evidence overall does not prove that a separate, single-store would be inappropriate for bargaining.

Based on the foregoing, especially the lack of regular interchange between the stores and the separate day-to-day supervision, I conclude that the Employer has not met its burden of proving that the Bed-Stuy store is an accretion to the existing multi-store unit covered by the ISOGNY contract. Rather, I find that a separate unit limited to the Bed-Stuy store is appropriate for bargaining, and I will direct an election in that unit.

CONCLUSIONS AND FINDINGS

Upon the entire record in this proceeding, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that P.S.K. Supermarkets, Inc., is a domestic corporation with its principal office and place of business located at 444 South Fulton Avenue, Mount Vernon, New York. It is engaged in the operation of retail supermarkets. During the past year, the Employer derived gross revenues in excess of $500,000, and purchased and received at its New York facilities, products and goods valued in excess of $5,000 directly from suppliers outside the State of New York. I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. Local 338, Retail, Wholesale and Department Store Union, United Food and Commercial Workers, AFL-CIO, is a labor organization as defined in Section 2(5) of the Act, and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. I hereby I find that the following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees, including cashiers, stock clerks, assistant managers, bookkeepers, department managers and department clerks, employed by the Employer at its 1420 Fulton Street, Brooklyn, New York, facility, but excluding confidential employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Local 338, Retail, Wholesale and Department Store Union, United Food and Commercial Workers Union, AFL-CIO, CLC. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who

have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **March 3, 2005.** No extension of time to file this list will be granted except in

extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (718) 330-7579. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-

0001. This request must be received by the Board in Washington by 5 p.m., EST by **March 10, 2005.** The request may **not** be filed by facsimile.

Dated: February 24, 2005.

ALVIN BLYER /S/

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Alvin Blyer
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National Labor Relations Board
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